Petition

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No. 81-981

In the Supreme Court of the United States

OCTOBER TERM, 1981

J. RICHARD DEMA and SALLY DEMA,
Petitioners,

No. 80-1138 vs.

INTERNAL REVENUE SERVICE,
Respondent.

J. RICHARD DEMA and SALLY DEMA,
Petitioners,

No. 80-1205 vs.

INTERNAL REVENUE SERVICE,
Respondent.

J. RICHARD DEMA and SALLY DEMA,
Petitioners,

No. 80-1982 vs.

INTERNAL REVENUE SERVICE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Did the Court below fail to recognize that where bad faith of the agency is the issue in a FOIA case a trial is mandated?

2. Is a trial necessary when the "crime fraud" exception to the Work Product privilege is invoked?

3. Is an executive privilege a/k/a "deliberative privilege" Constitutionally authorized?

4. Is there an exception to an award of reasonable attorneys fees in a FOIA case to a substantially prevailing party based on the alleged conduct of his attorney?

5. Is counsel for a party entitled to a hearing when falsely stigmatized in a written opinion of a District Judge?

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Petitioners pray that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on July 21, 1981. Rehearing *En Banc* was denied on August 26, 1981.

OPINION BELOW

The opinion of the U.S. Court of Appeals for the Seventh Circuit is "unpublished". Therefore it is printed in full in the Appendix hereto.

JURISDICTION

Jurisdiction is predicated on Title 28 U.S.C. Section 1254(1); 62 Stat. 928.

STATEMENT

The details of the Dema/Tabcor matter are recited in the simultaneously filed separate Petition for Certiorari in *Tabcor Sales Clearing, Inc.* v. *Department of the Treasury,* etc.* The instant appeals concern a related FOIA lawsuit also commenced in order to obtain discovery denied to petitioners in his damage suit (77 C3103) because of the pleading problems which caused stays of discovery to be granted.

Without a trial on the bad faith issue, the Court of Appeals affirmed the improper grant of summary judgment, applying the unconstitutional doctrine of executive privilege.

Without a hearing, attorneys fees were denied petitioners because of the alleged misconduct of petitioners' counsel. Typically, petitioners' counsel was slurred, as a ruse to deny petitioners an award of attorneys fees as a "substantially prevailing" party. The Court of Appeals condoned this practice.**

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* We requested consolidation but this case was only "carried with" the other appeals.

** This has become an ever increasing practice against lawyers who are unpopular with the IRS and this Court is asked to take judicial notice of that fact. See, statements of the Court in 77 C 3103 in the *Cert.* Petition separately filed.

Petitioners had "substantially prevailed" in that the FOIA litigation forced a partial disclosure. The remainder of the documents were sealed *in camera* and transmitted to the Court of Appeals. For some unexplained reason these *in camera* documents were never transmitted to this Court as part of petitioners' request for certification and transmission of the Record on Appeal. See, Appendix.

REASONS FOR GRANTING THE WRIT

I.

WHEN BAD FAITH IS THE ISSUE IN A FOIA CASE, IT IS NECESSARY FOR THERE TO BE A TRIAL AND SUMMARY JUDGMENT IS AN IMPROPER METHOD OF CASE DISPOSITION.

Summary judgment in the Federal Courts has become an oppressive tool to deny litigants a trial over a material dispute of facts. The District Court seemed to be disinterested in learning the facts. He appeared more interested in chastizing counsel without allowing explanations of the answers to his questions. We were interested in explaining to him how these cases fit into the conspiracy claims we made.

II.

A TRIAL WAS NECESSARY TO DETERMINE THE FACTS OF THE "CRIME FRAUD" EXCEPTION TO THE WORK PRODUCT PRIVILEGE.

We are talking about a criminal (extortionate) practice committed by IRS Agents on American businessmen. See, 26 U.S.C. Sec. 7214. See, separate *Cert.* petition filed herewith. The "crime fraud" exception to the work product privilege is well known and was claimed by us in the courts below. Department of Justice and IRS lawyers cannot hide behind the shield of their authority and then go out and engage in judicial coverups.

III.

EXECUTIVE PRIVILEGE IS NOT AN EVIDENTIARY PRIVILEGE WHICH WOULD TRIGGER EXEMPTION (b) (5) OF FOIA SINCE THE CONSTITUTIONAL FOUNDERS AND THIS COURT HAVE SPECIFICALLY REJECTED IT.

The 4 to 4 decision by this Court in *Halperin* represented a defeat for the Royalists who claim an implicit Executive power which was rejected by the Founders. "Deliberative" privilege or whatever else the government calls it is derivative from executive privilege.

IV.

PETITIONERS AS A SUBSTANTIALLY PREVAILING PARTY WAS ENTITLED TO REASONABLE ATTORNEYS FEES, UNDER FOIA, IRRESPECTIVE OF THE ALLEGED CONDUCT OF HIS ATTORNEY.

FOIA mandates fees to a party who "substantially prevailed" without exception. When disclosures are made only after the District Court orders *in camera* inspection, the party who causes that is entitled to attorneys fees—at least up to that point.

Counsel's conduct was a ruse to avoid having to make a favorable ruling on the "substantially prevailed" doctrine —in view of the damage case (77 C 3103). See, separate *Cert.* petition.

V.

COUNSEL IS ENTITLED TO A HEARING WHEN FALSELY STIGMATIZED IN A WRITTEN OPINION BY A DISTRICT JUDGE.

Lawyers have been branded in the past. It was lawyers who started the American Revolution. In America lawyers are indicted—In England they are knighted. Certain judges

in the U.S. District Court for the Northern District of Illinois, Eastern Division, have gone out of their way to damage the controversial lawyer that represents these Petitioners. Cert. Petitions Docket Nos. 76-755 (See, separately filed Cert. Petition); 78-1293—*Thomas K. Stewart* v. *State of Illinois* (See, also, 501 F. Supp. 53 (N.D. Ill. 1980) (Crowley, J.); 78-1575—*The Libertarian Party of Illinois* v. *Board of Election Commissioners of the City of Chicago*, et al; No. 79-389—*Paul Stout* v. *USA* --all attest to the explanation of why this has occurred.

Lawyers should not be so squelched without even the least rudimentary procedural due process protections. The "System" will not function with such barriers against the litigation legal bar of this country.

CONCLUSION

For the foregoing reasons, this Petition for Certiorari should be granted.

Respectfully submitted,

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Of Counsel:
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APPENDIX

APPENDIX A

Nos. 80-1138, 80-1205, 80-1982

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby AFFIRMED, with costs, in accordance with the order of this Court entered this date.

APPENDIX B

ORDER

This case consists primarily of an appeal from the district court order granting defendant's (IRS) motion for summary judgment on plaintiffs' Freedom of Information Act (FOIA) claim (80-1138). Consolidated with this appeal is an appeal from the district court order denying plaintiffs' counsel's motion for attorney's fees (80-1205) and denial of plaintiffs' *pro se* motion to expunge threats from the record (80-1982).[1]

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[1] In a series of motions presented prior to oral argument, at oral argument, and thereafter, plaintiffs seek to stay these appeals because of bad faith and fraud by the Government and the alleged absence of appellate jurisdiction. We have examined the motions and conclude that we have appellate jurisdiction of these appeals and also find that fraud or bad faith does not require a stay or postponement or oral argument. Plaintiffs are free to pursue such claims in the district court. Therefore, we consider the following motions and rule as stated:

(footnote continued)

I.

In a letter dated June 9, 1978 plaintiffs requested, pursuant to FOIA, "all [IRS] documents relating to investigation of a claim for damages (SF95) by J. Richard and Sally Dema in April 1976, with the Chief, Protective Programs Branch. . . ." The request was denied pursuant to exemption 5 of FOIA, which exempts from disclosure, documents which would not be available to a party involved in litigation with the agency. 5 U.S.C. § 552(b)(5). This exemption has been held to incorporate various privileges, including the executive privilege which protects documents used in the deliberative decisionmaking process. *EPA* v. *Mink*, 410 U.S. 73 (1973).

After unsuccessfully exhausting administrative appeals, plaintiffs filed the instant action seeking release of the documents. The IRS identified ten pages of documents as being within plaintiff's request. Of these ten pages, eight consisted of handwritten notes of the IRS attorney responsible for the investigation and two pages consisted of internal memoranda concerning the initiation, conduct, and suspension of the investigation.

(footnote continued)

Tabcor-Demas' Motion for Leave to File Tabcor's Reply to Government's Answer (in the Form of a Motion to Strike) which Includes Defendant's Motion to Strike Tabcor's Third (Fourth) Petition for the Issuance of Rules to Show Cause is GRANTED.

Tabcor's Motion for Leave to File Government's Memorandum and Tabcor's Reply in Support of Tabcor's Motion to Strike and Plaintiff-Counter-Defendant's Motion to Reconsider Order of March 23, 1981 in support of Tabcor's Motion for a Stay of Proceedings Based on Unusual Developments is GRANTED.

Tabcor's Motion for a Stay of Proceedings Based on Unusual Developments is DENIED.

After initiation of the action, the IRS released some of the requested documents. The released documents consisted of three entire pages and three edited pages of the IRS investigating attorney's handwritten notes. Thereafter, the IRS moved for summary judgment which the district court granted, holding that the documents were properly withheld under exemption 5 by virtue of being part of the predecisional deliberative process or as being attorney work-product material.

The district court also denied plaintiffs' counsel's motion for attorney's fees and motion to expunge from the record comments made by the district court concerning the behavior of plaintiffs' counsel. Denial of these motions form the basis for appeals 80-1205 and 80-1982, respectively.

II.

FOIA Claim

Exemption 5 of FOIA provides that certain documents are shielded from the mandatory disclosure provisions of FOIA. Exempt documents are:

> inter-agency or intra-agency memorandum or letters which would not be available by law to a party other than an agency in litigation with the agency.

5 U.S.C. § 552(b)(5). As noted above, exemption 5 has been held to incorporate various civil discovery privileges. *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975). In the present case, the IRS contends that the documents at issue are protected by both the executive privilege and the attorney work product privilege. Because we hold that the documents are exempt under the executive privilege, we need not discuss whether these documents are privileged as work product material.

The executive privilege incorporated into exemption 5 seeks to protect the confidentiality of the deliberative decisionmaking-process of federal agencies.[2] *United States* v. *Nixon,* 418 U.S. 683, 705 (1974). This is in recognition of the detrimental effects which would occur if pre-decisional consultations would be open to disclosure. Such disclosure would seriously impair the decisionmaking process as well as cause public confusion by the pronouncement of various agency policies. *Sears, Roebuck & Co.,* 421 U.S. at 150-51.

Two criteria must be met for a document to be covered by the executive privilege. First, the document must be pre-decisional. *Federal Open Market Commissioner of the Federal Reserve System* v. *Merrill,* 443 U.S. 340 (1979). The purpose of this requirement is clear—if a document is not predecisional, disclosure would not chill the candor of those rendering advice in the formulation of agency policy. Second, the document must be deliberative—that is, it must express opinions or make recommendations on matters of policy. *Vaughn* v. *Rosen,* 523 F.2d 1136, 1143-44 (D.C. Cir. 1975).

In the present case, the documents at issue fall squarely within the executive privilege. The unreleased documents consist of a memorandum and notes concerning the initiation, conduct, and suspension of an IRS investigation into plaintiffs' action filed against the IRS. We have observed the documents *in camera* and note that they relate to the strategy to be used in conducting the investigation. The conduct of the investigation certainly was "policy" within the jurisdiction of the IRS and these documents render opinions and make recommendations on how that investi-

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[2] Plaintiffs contend that the executive privilege does not exist. This simply is an incorrect statement of the law. *See, e.g., Federal Open Market Comm.* v. *Merrill,* 443 U.S. 340, 353 (1979).

gation should proceed. Therefore, they are exempt from disclosure.[3]

Attorney's Fees

5 U.S.C. § 552(a)(4)(E) provides:

> The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

Even if plaintiffs have substantially prevailed in this FOIA action (and there is considerable doubt in our minds whether they have) an award of attorney's fees is not automatic. *Blue* v. *Bureau of Prisons,* 570 F.2d 529, 533 (1978). The decision to award fees is left to the sound discretion of the district court. *Polynesian Cultural Center, Inc.* v. *NLRB,* 600 F.2d 1327, 1330 (9th Cir. 1979).

Four nonexhaustive criteria were set forth by Congress to guide the district courts in the exercise of discretion. These four criteria are: 1) the public benefit, if any, derived from the case; 2) commercial benefit to the plaintiff of disclosure; 3) nature of the requesting party's interest in the records sought; and 4) whether the Government's refusal to turn over the records had a reasonable basis in law. S. Rep. No. 93-854, 93rd Cong., 2d Sess. at 19. *Blue* v. *Bureau of Prisons,* 570 F.2d at 533. Besides these four criteria, however, the district court also is to consider the equitable factors developed in the older decisions on attorney's fees. *Id.*

As noted above, we have serious doubts whether plaintiffs could be said to substantially prevail on their claim.

---

[3] Plaintiffs at times make conclusory allegations of fraud and bad faith by the Government which require a trial. Our review of the record lends no support for these allegations and leads us to conclude that summary judgment was appropriate.

However, we need not dispose of this issue because the four criteria, as well as another factor, indicate that the district court did not abuse its discretion in denying attorney's fees.

There was little public benefit which resulted from the disclosure of the documents at issue. To be sure, almost all FOIA suits will, to some extent, have a "public" benefit by disclosure of documents. *Cuneo* v. *Rumsfeld,* 553 F.2d 1360, 1367 (D.C. Cir. 1977). However, the first factor goes beyond this notion of public benefit to encompass "the degree of dissemination likely and likely public impact that might be expected from a particular disclosure." *Blue* v. *Bureau of Prisons,* 570 F.2d at 533. This is completely absent in the present case. The disclosure appears to be solely for the private interest of the plaintiffs and "is [not] likely to add to the fund of information that citizens may use in making vital political choices." *Id.* at 534.

Nor was the IRS engaged in unreasonable behavior in withholding documents. The IRS at first refused to release certain documents and then did release several pages. Our review of these documents leads us to believe that the initial refusal to disclose was not unreasonable or without a basis in law. This factor as well as the first factor discussed above weigh heavily against the award of attorney's fees.[4]

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[4] The other two factors in the analysis, the requesting party's private interest in the records and any commercial benefit the requesting party would receive also weigh against an award of attorney's fees. Plaintiffs seek the documents in order to pursue their personal litigation against the IRS. This private interest leads us to conclude that the "[plaintiffs] have a sufficient interest in the requested information [so as] not [to] need the additional incentive of recovering their fees and costs to induce them to pursue their request in the courts." *La Salle Extension University* v. *FTC,* 627 F.2d 481, 484 (D.C. Cir. 1980).

The plaintiffs' main disagreement with the failure to award fees appears to be over the district court's consideration of the unprofessional conduct of plaintiffs' counsel. Plaintiffs vigorously argue that this should not be considered as a factor in disposing of the attorney's fees issue. We disagree.

Initially, we note that there is little doubt that plaintiffs' counsel engaged in conduct bordering on the contemptuous. Illustrative, and by no means exhaustive, of this unprofessional conduct is the colloquy between plaintiffs' counsel and the district court judge on the subject of attorney's fees.

> The Court: The amount of fees being asked for—what does this mean, "multiplied by three," Mr. Waxman?
>
> Mr. Waxman: Your Honor, there is authority for a multiplication factor based upon the difficulty of the case.
>
> The Court: Can you tell me what was difficult about this case?
>
> Mr. Waxman: Well, Your Honor, basically dealing with Your Honor is what was difficult about the case. In addition to that, trying to—
>
> The Court: What was that again? I didn't hear.
>
> Mr. Waxman: I said dealing with Your Honor was what was difficult.

R., Doc. 46 at 3 (Hearing of Dec. 21, 1980).

As noted above, besides the four factors noted in the relevant congressional reports, the district court is to consider the equitable factors developed in the older decisions on attorney's fees. Misconduct of counsel is an appropriate factor to rely upon in determining attorney's fees. *Magida*

v. *Continental Can Company*, 231 F.2d 843, 848 (2d Cir.), *cert. denied*, 351 U.S. 972 (1956).

In conclusion, we affirm the district court's denial of attorney's fees. The factors specifically relevant to whether attorney's fees are proper in a FOIA case weigh heavily against an award. Also, the conduct of counsel was a relevant factor to be assessed along with these other factors. Therefore, the judgment of the district court denying attorney's fees is affirmed.[5]

The judgment of the district court is, in all respects, affirmed.

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[5] Plaintiffs' appeal No. 80-1982 from the district court's denial of Dema's *pro se* motion to expunge comments from the record is frivolous. The behavior of plaintiffs' counsel in court and allegations made in papers filed in the district court lead us to conclude that the comments by the district court were within its power.

APPENDIX C

PETITION FOR EN BANC REHEARING

I.

The bad faith of the Defendant was first recorded by this Court in the divided opinion found in *U.S. and David J. Feddor* v. *Dema*, 544 F.2d 1373 (7th Cir., 1976) (Judge Markey in dissent), *cert. denied*, 429 U.S. 1093.

II.

The Record of the bad faith in this case since then requires the Court to order a *Rehearing En Banc* so that a reversal of the panel's opinion will create a display of the facts to document the acts of bad faith. It is for this purpose that trials are normally permitted. FOIA cases are no different. Plaintiffs here were "waylaid" on their way to Court and a trial has not been permitted to allow them to resolve factual issues.

III.

The statements in Plaintiffs' Briefs in these various appeals require a conclusion different than that reached by the panel, whose failure to address the clear substantive issues raised by Plaintiffs is evidenced by the Opinion's failure to resolve any substantive issues, except Executive Privilege. Even then the panel's discussion is based on stale Supreme Court authority.

IV.

Furthermore, the Record in this case does not justify the continuing attack on Plaintiffs' counsel. The Opinion appears to advocate that American counsel should use less than the zealous advocacy required by the Ethical and Constitutional standards imposed on lawyers by the Courts. Therefore, the full Court should *especially* review this as-

pect of the Opinion. This attack on counsel is a false issue which attempts to "drive a wedge" between a client and his attorney. A simultaneous Petition for *En Banc* Rehearing has been filed in related Appeal Nos. 79-1901, 80-1768, 80-2547, 80-2592 and 81-1055 (separate Opinion filed on July 21, 1981).

V.

Specifically, an itemization of Error, based on the Record, is provided. That itemization, as follows, is not exhaustive:

A. The quote of the colloquy between counsel and Judge Leighton is totally out of context and does not indicate that Judge Leighton took no action against counsel regarding that colloquy. Also, later in an unrelated proceeding (transcripts of which were attached to the Briefs available to the panel), Judge Leighton stated that he did not "take" those remarks in a "personal" way.

B. The issue in the case as to counsel's conduct related to an Assistant U.S. Attorney's, Mary Rigdon's, veracity and had nothing to do with the quotation cited in the Opinion.

C. The Court invoked stale Supreme Court authority as to the issue of the Constitutional existence of the so-called Executive Privilege.

D. The panel makes new law (based on stale law) regarding the issue of counsel's behavior as an affect on the entitlement of his client to attorneys fees, as a prevailing party in a FOIA case.

Respectfully submitted,

PLAINTIFFS-APPELLANTS
By: /s/ *Shelly Waxman*
SHELLY WAXMAN
Their Attorney

CERTIFICATE OF SERVICE

TO: John F. Murray, Acting
Asst. Attorney General
U. S. Department of Justice
Tax Division
Washington, D.C. 20530
Attn: Michael L. Paup,
Chief, Appellate Section

I, SHELLY WAXMAN, hereby certify that a copy of the foregoing Petition for *En Banc* Rehearing was mailed to the above-named individual at his respective address, with postage prepaid, on August 4, 1981.

/s/ Shelly Waxman
SHELLY WAXMAN

SHELLY WAXMAN & ASSOCIATES
30 West Washington Street
Suite 1115
Chicago, Illinois 60602
(312) 782-1360

APPENDIX D

(Letterhead of Shelly Waxman & Associates)

November 18, 1981

H. Stuart Cunningham
Clerk of the United States District Court
Northern District of Illinois
219 South Dearborn Street
Chicago, Illinois 60604

Re: Dema/Tabcor Cases
NOS. 75C2401 77C3103 78C3992 78C2673

Dear Mr. Cunningham:

We have requested Mr. Strubbe to certify the record in the below referenced appeals. The certification we received dated October 30, 1981 does not provide the full record of the above listed cases. For some unexplained reason, these records were returned to you prior to certification, although we had requested their transmittal to the U.S. Supreme Court. As you know, highly sensitive sealed *in camera* documents are involved.

Please forward the complete records to Mr. Strubbe so that he can make an immediate supplemental certification.

FL,
/s/ *Shelly Waxman*
Shelly Waxman

cc: Thomas Strubbe
Re: Appeal Nos. 80-1138 80-1205 80-1982 80-1901 80-1768 80-20547, 80-2592 and 81-1055.
Clerk of the U.S. Supreme Court
J.R. Dema

(Certified Return receipt requested)

APPENDIX E

(Letterhead of Shelly Waxman & Associates)

November 18, 1981

Mr. Thomas Strubbe
Clerk of the U.S. Court of Appeals
for the 7th Circuit
219 South Dearborn
Chicago, Illinois 60604

Re: Dema/Tabcor Appeal Nos. 80-1138 80-1205 80-1982 79-1901 80-1768 80-20547, 80-2592 & 81-1055

Dear Mr. Strubbe:

The certification we received in Appeal Nos. 80-2547, 80-2592, 81-1055 were only some of the records we wish to be transmitted to the United States Supreme Court. We do not understand the difficulties that are being caused over this relatively simple matter. This is now the third letter we have sent.

Furthermore, it is obvious that not all of the record has been certified. The *in camera* documents, motions and the post mandate filings have not been included. We can't understand this as they were all filed by order of court. Please do what you can to take control of this matter so that the complete record is transmitted to the Clerk of the United States Supreme Court. It is not enough to state that you do what "they" tell you to do.

FL,
/s/ *Shelly Waxman*
Shelly Waxman

cc: Clerk of the U.S. Supreme Court
J.R. Dema

(Certified return receipt requested)

Opposition

Office - Supreme Court, U.S.
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v.

INTERNAL REVENUE SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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INTERNAL REVENUE SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioners seek review of the decision below rejecting their Freedom of Information Act request, in which they sought release of certain documents prepared by officials of the Internal Revenue Service in connection with their investigation of an administrative tort claim against that agency.[1]

The relevant facts may be summarized as follows: On June 9, 1978, petitioners filed a request with the Internal Revenue Service pursuant to the Freedom of Information Act (5 U.S.C. 552), seeking "all documents relating to [the]

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[1]Petitioners have also joined in another petition (No. 81-979), in which they similarly challenge the denial of relief requested in a separate Freedom of Information Act suit seeking the production of a memorandum prepared by an attorney-advisor to the Department of the Treasury regarding possible changes in the employment tax provisions of the Internal Revenue Code of 1954.

investigation of a claim for damages (SF 95) [filed] by J. Richard and Sally Dema in April 1976, with the Chief, Protective Programs Branch * * *." A search by the Internal Revenue Service disclosure staff located 10 pages of materials falling within the scope of the request.[2] The Internal Revenue Service declined to produce those documents, however, on the ground that they consisted of predecisional deliberative material or attorney work product exempt from disclosure under 5 U.S.C. 552(b)(5) (Pet. App. 2).

After petitioners brought this action in the United States District Court for the Northern District of Illinois, the Internal Revenue Service released three pages in their entirety of the material in question and portions of three other pages. The IRS then moved for summary judgment with respect to the remaining undisclosed material. After an in camera examination of the withheld pages, the district court ruled that the documents were protected from disclosure under both the executive and work product privileges in 5 U.S.C. 552(b)(5). The district court also denied petitioners' motion for an award of attorneys' fees in the case and denied the pro se motion of J. Richard Dema to expunge from its opinion certain comments regarding the conduct of petitioners' counsel (Pet. App. 3). The court of appeals affirmed (Pet. App. 8).

1. Contrary to petitioners' contention (Pet. 4), the district court appropriately resolved by summary judgment the question whether the documents withheld from petitioners were exempt from disclosure under 5 U.S.C. 552(b)(5). The existence of documents of the type requested was not disputed. The Internal Revenue Service released

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[2]The documents consisted of two pages of internal memoranda concerning the initiation, conduct and suspension of the investigation of petitioner's claim, and eight pages of handwritten notes of the attorney responsible for investigating that claim (Pet. App. 2).

some of the documents to petitioners and produced all of the remaining materials for an in camera examination by the district court. Both the district court and the court of appeals concluded that the contents of the documents brought them squarely within the scope of the exemption from mandatory disclosure provided by Section 552(b)(5). Since petitioners failed to adduce any support for their conclusory allegations of fraud and misconduct or to demonstrate that there were any other material issues of fact to be resolved, summary judgment was entirely appropriate.

2. The court of appeals also correctly rejected petitioners' claim (see Pet. 5) that the Internal Revenue Service may not rely on the "executive" or "deliberative" privilege to justify its refusal to comply fully with their Freedom of Information Act request. To the contrary, this Court has specifically held that 5 U.S.C. 552(b)(5)—which exempts from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency"—incorporates several long-recognized civil discovery privileges, including the "deliberative" and "work-product" privileges. See, *e.g.*, *Federal Open Market Committee of the Federal Reserve System* v. *Merrill*, 443 U.S. 340 (1979); *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975); *EPA* v. *Mink*, 410 U.S. 73 (1973). As the court below noted (Pet. App. 4-5), there can be little doubt that memoranda relating to the strategy to be followed in conducting the investigation and defense of the tort claim by petitioners fall within the intendment of this statutory exemption.[3]

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[3]Contrary to petitioners' contention (Pet. 5), the decision in *Halperin* v. *Kissinger*, 606 F. 2d 1192 (D.C. Cir. 1979), aff'd by an equally divided Court, No. 79-880 (June 22, 1981), does not stand for the proposition that there is no executive privilege available in Freedom of Information Act actions where the plaintiffs have alleged governmental misconduct. Insofar as it is relevant here, that decision held (606

3. Finally, petitioners contend (Pet. 5) that the decision below improperly denied them an award of attorney's fees. But petitioners secured the release of only a small part of the material requested. Hence, they have not satisfied the threshold requirement of having "substantially prevailed" in this action. 5 U.S.C. 552(a)(4)(E).[4]

At all events, the district court acted well within its discretion in refusing to make such an award in this case. See *Polynesian Cultural Centers, Inc.* v. *NLRB*, 600 F. 2d 1327, 1330 (9th Cir. 1979); *Blue* v. *Bureau of Prisons*, 570 F. 2d 529, 533 (5th Cir. 1978). As the court of appeals noted (Pet. App. 5-8), the Internal Revenue Service had a reasonable basis for initially refusing to release any of the requested information, and the disclosure sought was solely for petitioners' personal benefit. See *Blue* v. *Bureau of Prisons, supra*, 570 F. 2d at 533-534. Moreover, the district court was entitled to consider counsel's unprofessional conduct in the litigation, as well as other equitable factors, in making its discretionary decision whether to award attorney's fees to petitioners. See *Blue* v. *Bureau of Prisons, supra*, 570 F. 2d at 533.[5]

F. 2d at 1210-1213) that there is no executive privilege that confers upon the President absolute immunity from a damage action by private individuals for alleged violations of statutory and constitutional rights.

[4]Under 5 U.S.C. 552(a)(4)(E), the district court may award to private litigants attorneys' fees and other litigation costs "reasonably incurred in any case under this section in which the complainant has substantially prevailed."

[5]Petitioners also claim (Pet. 5) that their counsel was "falsely stigmatized" by the district court in its memorandum order denying petitioners' request for attorney's fees. The court noted that, during the presentation of that motion, petitioners' counsel "purpose[ful]ly, in the presence of a large number of his fellow lawyers, made a statement to the court which he intended to be insulting, disrespectful, and contemptuous." (Order of Dec. 21, 1979, at 2). The court of appeals concluded (Pet. App. 7) that the record demonstrated that the district court's description of counsel's conduct was entirely accurate.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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